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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955.

**No. 684**

MICHIGAN WISCONSIN PIPE LINE COMPANY,
*Petitioner,*

*vs.*

PHILLIPS PETROLEUM COMPANY,
*Respondent.*

## REPLY BRIEF OF PETITIONER.

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THE BYNTHROP-WARREN PRINTING COMPANY, CHICAGO

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## REPLY BRIEF OF PETITIONER.

In accordance with Rule 24(4) of the Rules of this Court, petitioner submits the following in reply to respondent's brief in opposition to the granting of the writ.

### A. PETITIONER COULD NOT PROTECT ITSELF FROM ERROR IN THE COMMISSION'S DETERMINATION OF RESPONDENT'S INITIAL RATE.

Phillips first argues (Brief, 12-13) that petitioner is attempting to "shift the burden of the Commission's error to respondent," and that *petitioner* could have protected itself by appealing from the Commission's determination of Phillips' rates in the Michigan Wisconsin rate case. The fallacy in this contention demonstrates precisely why this is an important matter for this Court's consideration.

In Opinion No. 275-A, the Michigan Wisconsin rate case decision, the Commission finally determined that Phillips'

lawful rate to petitioner effective June 7, 1954 was 8.423¢ per Mcf and fixed petitioner's cost of gas on that basis. Since petitioner was allowed as its cost the full price that Phillips might lawfully charge under the Commission's decision, petitioner had no reason—and indeed lacked requisite interest—to appeal the Commission's decision as to Phillips' proper charge.

In order to appeal under Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b), one must be "aggrieved" by the order sought to be reviewed. Petitioner was allowed as its cost of gas the full price the Commission determined that Phillips might charge and thus was not "aggrieved" by the order. Yet Phillips is now suggesting that petitioner had a duty to appeal the order in an attempt to set aside the Commission's determination of Phillips' charges to petitioner on the ground that they were too low!

This *non-sequitur* serves to emphasize why Phillips had a right and a duty to participate in the Michigan Wisconsin proceedings. Phillips, not petitioner, was the proper party to challenge the Commission's decision in Opinion No. 275-A fixing Phillips' rates. Of the two parties before the Court, Phillips alone had power to protect *both* parties from the consequences of error in the Commission's determination. But Phillips elected to remain aloof from the proceeding in which that determination was made, as a result of which one of the parties must suffer a large loss. It is consonant neither with principles of justice nor with sound administrative practice to shift the loss to petitioner, who was powerless to avoid it.

## B. PHILLIPS' PETITION FOR REVIEW WAS A COLLATERAL ATTACK UPON OPINION NO. 275-A.

Phillips next argues (Brief, 13-17) that the Commission did not in fact determine its rates in the Michigan Wisconsin proceeding, and that in any event it is not bound by that determination.

With respect to the question whether the Commission actually determined Phillips' rates in the Michigan Wisconsin proceeding, the record permits only one answer. In its order issued October 1, 1954 in response to Phillips' rate filing, the first order under review in this case, the Commission, after referring to the fact that the question of Phillips' lawful charges was already in issue in the Michigan Wisconsin proceeding, stated:

> "On September 27, 1954, upon consideration of the application of Michigan Wisconsin Pipe Line Company for modification of Opinion No. 275 and accompanying order, the Commission granted such application to the extent only that it requested a reconsideration of that opinion and order upon the present record. In the determination of the issues thus raised, *consideration must be given to the proper rates for gas purchased by Michigan Wisconsin from Phillips,* and it is proper and in the public interest that *pending such reconsideration* the rate increases filed by Phillips applicable to gas purchased by Michigan Wisconsin be suspended" (R. 85).[1]

Again in Opinion No. 275-A, the Commission made clear that it was first determining Phillips' rates and then applying that rate to fix petitioner's cost of gas purchased. The Commission said:

> "We find that on the basis of equal treatment with other producers which have been accorded their effective June 7, 1954, rates, *Phillips is in equity entitled to a rate which will give effect to Michigan-Wiscon-*

[1] Emphasis is supplied throughout.

> *sin's resale rate of 31.25¢ per Mcf* which we have found to be proper in Docket No. G-1678. The resultant rate is 8.423¢ per Mcf at 14.735 psia for gas from the Dedicated Acreage. Using that rate to figure the cost of gas in determining Michigan-Wisconsin's cost of service in Docket No. G-1996, we find that a fair and reasonable rate, applicable to sales for resale by Michigan-Wisconsin from and after December 12, 1952, is 31.60¢ per Mcf."

The Commission then continued:

> "This will require some modification of the Commission's order issued October 1, 1954, suspending certain of Phillips' rates. Such action will be entered in the appropriate docket (No. G-3176)."[2]

Finally, in its order issued December 8, 1954, the second order here under review, the Commission simply quoted from Opinion No. 275-A and applied the conclusions it had reached in that decision with respect to Phillips' proper charges (R. 106-10).

In the light of a record so clear and explicit, respondent's statement (Brief, 14) that "there is no indication that the Commission was attempting to fix respondent's rates in petitioner's rate proceeding" is difficult to understand. The Commission said as clearly as the English language permits that it intended to give consideration "to the proper rates for gas purchased by Michigan Wisconsin from Phillips" upon reconsideration of its original decision in the Michigan Wisconsin rate case (R. 85). Nor was Phillips ever in doubt that the question of its rates was in issue—indeed, was the *sole* issue—upon consideration of Opinion No. 275.

Phillips next argues (Brief, 15-17) that, even though the Commission did decide the question of its lawful charges to petitioner in the latter's rate case, Phillips is

[2] See Appendix D to petition for certiorari, p. 28a.

not bound by that determination; that, while it may have had a right to intervene, it had no duty to do so. The heart of this argument is that Phillips' rates could not be fixed in a proceeding to which it was not a party and in which no evidence or findings were made with respect to reasonableness.

The difficulty here, which Phillips attempts to minimize by footnote treatment (Brief, 17, note 5) is that the question involved was not a *change* in Phillips' rate but rather a determination under Section 4(c) of the Act as to Phillips' initial rate as of June 7, 1954.[3] That determination was, of course, bi-lateral in its effect, just as the contract upon which it was based was bi-lateral. That is, the Commission's determination of Phillips' lawful rate fixed petitioner's obligation to pay just as it fixed Phillips' right to collect and retain. There was therefore no more reason why that determination should have been made in the docket relating to Phillips' rate filing than in petitioner's rate case, where the issue had already become material. And when the Commission unequivocally notified Phillips that the determination would be made in petitioner's rate case, Phillips was under an obligation, if it desired to protect its rights, to participate in that proceeding.

In this connection, it should be pointed out that, under the decision of the court below, Phillips' charges to petitioner were fixed in a proceeding to which *petitioner* was not a party, in which no hearings were ever held and no findings of reasonableness made. In other words, Phillips' basic contention, that its rights could not be determined in a proceeding to which it was not a party, is one that

[3] This is not in conflict with the Commission's position below. Having determined Phillips' initial rate to be lower than that claimed by Phillips, the Commission treated the excess as a rate increase proposal and set that question for hearing in accordance with Section 4(e) (R. 85-86).

petitioner might make with equal force, since petitioner was not made a party to the Commission proceedings reviewed by the court below. The one difference is that Phillips was on notice that its rates would be determined in petitioner's rate case, as in fact occurred, whereas no proceedings were ever held in the docket relating to Phillips' rate filing, and petitioner thus had no purpose or opportunity to intervene in that docket.

The lack of basis for Phillips' position is emphasized by its attempted reliance upon *Zenith Radio Corp.* v. *Federal Communications Commission*, 211 F. 2d 629 (C. A. D. C.). There, it was held that one who had made an application for a license to operate a television station on a particular channel had not waived its statutory right to a hearing on that application because it failed to intervene in *rule-making* proceedings involving the allocation of television channels in a number of cities. The court said (p. 634):

> "Such an established statutory right requires adjudicatory disposition, and the procedure which is sufficient for rule-making is not sufficient for that purpose."

Moreover, the petitioner in that case was able to show that the rule-making proceedings did not purport to decide the question as to which company should operate a particular channel but was concerned with what channels should be assigned to various cities.

Here, on the other hand, Phillips does not question the fact that it received explicit notice that the question of its proper initial charge to petitioner would be decided in petitioner's rate case (R. 85) nor deny that such a determination would have been entirely appropriate if it had seen fit to intervene. Phillips' position is and must be that

the Commission's determination in Opinion No. 275-A of Phillips' lawful charges to petitioner is not binding on Phillips solely because it saw fit not to participate in that proceeding. That, certainly, was the sole basis of the decision of the court below on this question. (Pet. App. 12a.) But as was pointed out in the petition for certiorari, decisions such as *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282 (C. A. D. C.) are to the contrary. Having failed to participate in the proceeding or to appeal the decision passing directly on the question of its proper initial charge to petitioner, Phillips cannot now use a purely collateral order of the Commission as a vehicle for an attack on the substantive determination.

### C. THE COURT BELOW DETERMINED PHILLIPS' RATE TO BE HIGHER THAN THAT ALLOWED BY THE COMMISSION.

Phillips' position with respect to the question whether the court below properly determined its lawful rate as of June 7, 1954, is that Order No. 174-A of the Commission "clearly and unambiguously provided that the contract together with all amendments and supplements thereto would establish the effective rate on June 7, 1954" (Brief, p. 18). Thus, it is argued, the question was purely one of construction of the contract—as to which the Commission was wrong and the court below right.

It should be noted that Opinion No. 275, which was issued two weeks *after* Order No. 174 was adopted, held that the automatic escalator provisions of the contract could not be regarded as effective in determining Phillips' rate as of June 7, 1954. The result is that the interpreta-

tion of Order No. 174 that seems "clear and unambiguous" to Phillips was specifically rejected by the Commission only two weeks after adoption of that Order.

Order Nos. 174 and 174-A define an independent producer's rate schedule as "the basic contract and all supplements or agreements amendatory thereof, *effective and applicable* on and after June 7, 1954." Phillips and the court below took the position that this presented purely a question of contract law, namely, a determination of the price effective and applicable on June 7, 1954, under the contract. But the Commission, only two weeks after issuing the order, pointed out that all provisions of a contract were not "effective and applicable" on June 7, 1954, if they contravened the provisions of the Natural Gas Act. Neither Phillips nor the court below has ever been able satisfactorily to explain why the Commission's contemporaneous interpretation of its own order is erroneous or by what right the court may peremptorily set it aside.

## CONCLUSION.

The brief in opposition serves merely to emphasize the importance of the questions presented by the petition for certiorari. Phillips seeks support for its position mainly from the fact that the Commission has not independently sought certiorari in this Court. Petitioner does not, of course, know what considerations were involved in that decision, but the expectation that legislation would be passed exempting independent producers from regulation by the Commission may well have been a factor. While the questions presented are in no sense limited to the factual situation here involved, the fact that such legisla-

tion failed to become law makes even more certain that those questions will arise in the future.

Respectfully submitted,

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